No. 90-952 (4)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JANICE G. CLARK, *et al.*,
Appellants,

v.

CHARLES "BUDDY" ROEMER, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Louisiana

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BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

1. Is the failure to preclear voting changes under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c, automatically cured by the preclearance of subsequent or related voting changes in the same election district?

2. Did the district court err in failing to enjoin elections for state court judgeships held pursuant to voting changes to which the United States Attorney General objected under Section 5?

3. What relief should be ordered by this Court in a situation where the federal district court improperly permitted elections to occur pursuant to voting changes to which the Attorney General objected under Section 5?

PARTIES

The parties in the court below are as follows:

Plaintiffs: Janice C. Clark, Orscini L. Beard, Eddie G. Crawford, Norbert C. Rayford, Voter Information Project, Inc., Louis Scott, Sylvia Cooks, Connie Sadler, Lloyd Dangerfield, Tom Nelson, Albert Richard, Brenda Ford, Edward Larvadain, and Josie Frank, on behalf of themselves and all others similarly situated.

Plaintiff-Intervenor: The New Orleans Chapter of the Louis A. Martinet Society.

Defendants: Charles "Buddy" Roemer, in his capacity as Governor of Louisiana; Fox McKeithen, in his capacity as Secretary of State of Louisiana; and William Guste, in his capacity as Attorney General of Louisiana.

Defendants-Intervenors: The Louisiana District Judges Association and the Orleans Parish Trial Judges Association.

The plaintiffs in the court below are appellants in this Court. The defendants and defendant-intervenors in the court below are appellees in this Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
A. The District Court's Holding That The Clearance Of Voting Changes Automatically Clears Prior Or Related Voting Changes In The Same District	6
B. The District Court's Ruling Permitting Elections For Judgeships It Conceded Had Not Been Cleared	10
C. Subsequent Proceedings	11
SUMMARY OF ARGUMENT	13
ARGUMENT	15
I. THE DISTRICT COURT ERRED IN HOLDING THAT PRECLEARANCE OF VOTING CHANGES AUTOMATICALLY CLEARS PRIOR AND RELATED VOTING CHANGES IN THE SAME JUDICIAL DISTRICT	15
II. THE DISTRICT COURT ERRED IN PERMITTING ELECTIONS TO GO FORWARD PURSUANT TO UNCLEARED VOTING CHANGES TO WHICH THE ATTORNEY GENERAL OBJECTED UNDER SECTION 5	24

TABLE OF CONTENTS—Continued

Page

III. THE ELECTIONS THAT OCCURRED PURSUANT TO UNCLEARED CHANGES SHOULD BE SET ASIDE, AND THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR CONSIDERATION OF ANY FURTHER RELIEF THAT MAY BE NECESSARY 30

CONCLUSION 36

TABLE OF AUTHORITIES

Cases Page

Berry v. Doles, 438 U.S. 190 (1978) 29, 33
Brooks v. Georgia State Board of Elections, No. CV 288-146 (S.D. Ga. Dec. 1, 1989) (three-judge court), *aff'd mem.*, 111 S. Ct. 288 (1990) 15, 27
Canady v. Lumberton County Board of Education, 454 U.S. 957 (1981) 25
Chisom v. Roemer, No. 90-757 (consolidated with) *United States v. Roemer*, No. 90-1032 12
City of Richmond v. United States, 376 F. Supp. 1344 (D.D.C. 1974) (three-judge court), *vacated and remanded*, 422 U.S. 358 (1975) 32
City of Rome v. United States, 450 F. Supp. 378 (D.D.C. 1979) (three-judge court), *aff'd*, 446 U.S. 156 (1980) 32
Clark v. Roemer, 111 S. Ct. 376 (1990); *modified* 111 S. Ct. 399 (1990) 11
Connor v. Waller, 421 U.S. 656 (1975) 26
Georgia v. United States, 411 U.S. 526 (1973) 25-26, 29
Haith v. Martin, 618 F. Supp. 410 (E.D.N.C. 1985) (three-judge court), *aff'd mem.*, 477 U.S. 901 (1986) 15, 20, 27
Hathorn v. Lovorn, 457 U.S. 255 (1982) 15, 26, 32-33
Holt v. City of Richmond, 406 U.S. 903 (1972) 25
Houston Lawyers' Association v. Attorney General of Texas, No. 90-813 (consolidated with) *LULAC v. Attorney General of Texas*, No. 90-974 12-13
Lucas v. Townsend, 486 U.S. 1301 (1988) (Kennedy, J., in chambers) 25-26, 28
LULAC v. Clements, 914 F.2d 620 (5th Cir. 1990) (en banc) 5-6
McCain v. Lybrand, 465 U.S. 236 (1984) 13, 16-20, 22
Morris v. Gressette, 432 U.S. 491 (1977) 22
NAACP v. Hampton County Election Commission, 470 U.S. 166 (1985) 14, 29, 31, 33-34
Oden v. Brittian, 396 U.S. 1210 (1969) 30
Perkins v. Matthews, 400 U.S. 379 (1971) 29, 33-34
South Carolina v. Katzenbach, 383 U.S. 301 (1966) 24

TABLE OF AUTHORITIES—Continued

	Page
State of Louisiana v. United States, No. 91-0122 (D.D.C.)	12
United States v. Board of Commissioners of Sheffield, 435 U.S. 110 (1978)	21, 23-24
United States v. Board of Supervisors of Warren County, 429 U.S. 645 (1977)	25-26
United States v. County Commission of Hale County, Alabama, 425 F. Supp. 433 (S.D. Ala. 1976) (three-judge court), *aff'd mem.*, 430 U.S. 924 (1977)	29-30
Constitution and Statutes	
U.S. Constitution, Amendment XIV	3
U.S. Constitution, Amendment XV	3
Section 2 of the Voting Rights Act, 42 U.S.C. Section 1973	3, 12
Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c	*passim*

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BRIEF FOR APPELLANTS

OPINIONS BELOW

The order and opinion of the three-judge district court dated October 31, 1990 is published at 751 F.Supp. 586 (M.D. La. 1990), and is reproduced in the appendix to the Jurisdictional Statement. (J.S. App. 1a). The three-judge district court's order of October 22, 1991 is published as an appendix to the October 31 order and opinion at 751 F.Supp. 586, 598 (M.D. La. 1990), and is reproduced in the appendix to the Jurisdictional Statement. (J.S. App. 68a). The October 2, 1990 order of the three-judge district court is unpublished and is reproduced in the appendix to the jurisdictional statement (J.S. App. 85a), as is the September 28, 1990 order of that court. (J.S. App. 90a).

JURISDICTION

This is an appeal from the denial of injunctive relief by a three-judge district court, and this Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1253

and 42 U.S.C. Section 1973c. The district court's orders were entered on September 28, 1990, October 2, 1990, and October 22, 1990, and modified on October 31, 1990. A notice of appeal from the September 28, October 2, and October 22 orders was filed on October 26, 1990. (J.S. App. 188a). A supplemental notice of appeal from those orders and the October 31 modification was filed on November 6, 1990. (*Id.* at 190a). The Jurisdictional Statement was filed and the appeal was docketed on December 14, 1990, and this Court noted probable jurisdiction on January 18, 1991.

STATUTE INVOLVED

Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c, is repeated verbatim in the appendix to the Jurisdictional Statement. (J.S. App. 193a).

STATEMENT OF THE CASE

Section 5 of the Voting Rights Act provides that covered jurisdictions, including the State of Louisiana, may not implement voting changes unless they obtain preclearance by persuading the United States Attorney General or the United States District Court for the District of Columbia that the changes do not have a discriminatory purpose or effect. In the event preclearance is denied by the Attorney General, a covered jurisdiction may still seek preclearance by filing a Section 5 declaratory judgment action in federal district court in the District of Columbia.

Over the past twenty-five years, Louisiana has made a number of changes in its laws regarding judicial elections, including the creation of many new elected judgeships. Some of the changes were submitted for Section 5 preclearance shortly after they were enacted, but many were not. Nevertheless, the State implemented all of the voting changes, including those that had not been submitted. The result was a state court judiciary composed of a combination of precleared and uncleared judgeships,

and even within specific judicial districts some of the judgeships were precleared and others were not.

This appeal grows out of the failure of a three-judge federal district court in the Middle District of Louisiana to enjoin elections for certain Louisiana state court judgeships held pursuant to voting changes to which the United States Attorney General objected under Section 5. The appellants are black registered voters and a voting rights organization in Louisiana, and are plaintiffs in the district court below. They filed this class-action litigation in 1986 challenging the use of at-large voting in multi-member election districts for state trial and intermediate appellate court judges in Louisiana under Section 2 of the Voting Rights Act, 42 U.S.C. Section 1973, and the Fourteenth and Fifteenth Amendments, and also challenging under Section 5 a few unprecleared voting changes involving judicial elections. As provided by Section 5, the claims arising under that section of the Act were assigned to a three-judge district court, while the Section 2 and constitutional claims were assigned to a single judge.

After the initial complaint was filed, the plaintiffs uncovered a number of additional unprecleared judicial election voting changes. On July 30, 1987, an amended complaint was filed adding claims under Section 5 involving those changes. (J.A. 15).

Once the plaintiffs moved to amend the complaint and add the new Section 5 violations, the State submitted the changes to the United States Attorney General for Section 5 clearance. In letters dated September 23, 1988 (J.S. App. 108a) and May 12, 1989 (J.S. App. 127a), the Attorney General objected under Section 5 to many of the changes, including the creation of some 47 judgeships elected through at-large voting with designated posts and a majority vote requirement. In the meantime, on September 27, 1988, the three-judge court enjoined the impending fall, 1988 elections for the four uncleared judge-

ships scheduled to be elected at that time. (J.S. App. 98a). Those four judgeships were created in 1987, (*id.*), and had not been filled prior to the elections.

Despite the Attorney General's Section 5 objections and the September, 1988 injunction from the district court, the State did not seek clearance in the United States District Court for the District of Columbia. Instead, State officials proceeded with plans to hold the fall, 1990 elections for both cleared judgeships *and* uncleared judgeships to which the Attorney General had objected. (1990 is the regular election year for all of the state's district court (trial court) judgeships and many of the court of appeal judgeships). Shortly after learning of this, the plaintiffs filed on July 23, 1990 a motion asking the three-judge district court to enjoin the elections involving uncleared voting changes. (J.A. 48).[1]

On September 17, 1990, while the Section 5 injunction motion was pending, the Attorney General responded to a request for reconsideration by withdrawing his objection to eleven judgeships in Orleans Parish. (J.S. App. 136a). However, he refused upon reconsideration to withdraw the rest of the objections, saying the State had not carried its burden of proving the absence of a racially discriminatory purpose in creating and maintaining the voting changes encompassed by those objections. (*Id.* at 142a). The Attorney General also objected to four new judgeships created since the issuance of the earlier objection letters. (*Id.*).

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[1] At the time of the plaintiffs' motion, the single judge hearing the Section 2 case already had found violations of Section 2 in eleven judicial districts and had enjoined further elections in those districts until a remedial plan could be imposed. Accordingly, the plaintiffs did not include any of the judgeships in those eleven districts in their July 23 Section 5 injunction motion. Once that Section 2 injunction was lifted on October 2, 1990, the plaintiffs immediately added the uncleared voting changes in those eleven districts to their Section 5 injunction motion. (J.A. 93).

The United States entered an appearance in the district court and filed a memorandum *amicus curiae* supporting the plaintiffs' motion for an injunction. On September 28, 1990, a hearing was held at the conclusion of which the three-judge court entered an interim order that permitted the regularly scheduled primary elections on October 6 and the runoff on November 6 to proceed for the time being, but enjoined the winning candidates for any uncleared judgeships from taking office. (J.S. App. 90a). The three-judge court later said it permitted the elections to proceed in this provisional manner because it was uncertain about the applicability of Section 5. (*Id.* at 32a). The court also asked for further briefing on the issues. Because the three-judge court's action was not final, and because it left open the possibility that the election results would be nullified, the plaintiffs did not at that time take the extraordinary step of seeking injunctive relief from this Court.

Also on September 28, the Fifth Circuit sitting en banc released its decision in *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc), holding that Section 2 of the Act does not apply to judicial elections. Accordingly, on October 2, 1990, the single judge hearing the Section 2 claims lifted an injunction he previously had issued against elections under the existing at-large system in eleven judicial districts where he found a Section 2 violation. In the wake of lifting the injunction, he also ordered that elections in those districts proceed under an accelerated special election schedule, with qualification to occur October 3-5, the first primary on November 6, and the runoff on December 8. (J.S. App. 81a). Given that the Attorney General had objected to some of the judgeships in those eleven districts, the three-judge court issued a separate order on October 2 stating that the elections for those uncleared judgeships would go forward on the same special election schedule, but the winners would be enjoined from taking office. (*Id.* at 85a).

On October 9, the Attorney General sent another letter to the State saying the previously interposed Section 5 objections would not be withdrawn despite the Fifth Circuit's decision in *LULAC*. (J.S. App. 168a).

After further briefing, the three-judge court held another hearing on October 18, 1990. On October 22, the court issued an order that denied the injunctive relief requested by the plaintiffs and permitted the elections to proceed and the winners to take office. (J.S. App. 68a). That order was followed by an October 31 opinion explaining the rationale for the October 22 order and modifying it with respect to one judgeship (which is discussed in n. 2 below). (*Id.* at 1a). In the October 22 order and the October 31 opinion, the district court ruled, first, that many of the voting changes to which the Attorney General objected had already been automatically cleared because subsequent or related voting changes in the same judicial districts had been cleared. Second, for those judgeships which the district court conceded had never been cleared, the court permitted the elections to occur and the winners to serve "provisionally" while the State seeks clearance through a declaratory judgment action in the United States District Court for the District of Columbia. Each of these holdings is discussed in more detail.

A. The District Court's Holding That The Clearance Of Voting Changes Automatically Clears Prior Or Related Voting Changes In The Same District.

The three-judge court held there was no need for clearance of a large number of the changes to which the Attorney General objected because subsequent voting changes in the same judicial districts had been submitted and cleared. For example, said the court, the clearance of the creation of a seventh at-large judgeship in a district would necessarily clear the creation of the previous six at-large judgeships. (J.S. App. 25a). Thus, even though one or more of the previous six may not have

been submitted until after clearance of the seventh, and even though the Attorney General objected once the earlier judgeships were submitted, the district court held the Attorney General's objections to be invalid. The court said:

> When the Attorney General approves the new act, he not only approves the amended portion but necessarily approves the older, reenacted part, which forms part of the new act. Thus, when an act provides for a certain number of judicial positions, approval of that act must include all of the judicial positions necessary to reach that number.

(*Id.* at 27a-28a).[2]

Most of the situations in which the district court applied this rule involved the creation of at-large judgeships in districts where subsequently created at-large judgeships were submitted and precleared. However, the district court also nullified the Attorney General's objections in four other situations that do not fit the same pattern. (J.S. App. 51a-52a). They are as follows:

- The Attorney General objected to Act 305 of 1975, which created designated divisions (or posts) within the First Circuit Court of Appeal. (J.S. App. 112a-113a,

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[2] The judgeships that the district court held to have been cleared despite the Attorney General's objections are listed in Part I of the October 22 order (J.S. App. 70a-71a). In addition, on October 31, the district court also held that Division B of the 20th district was cleared notwithstanding the Attorney General's objection. (J.S. App. 53a). It should be noted here that the district court need not have listed in Part I of its October 22 order the judgeships of the 17th and 32nd judicial districts. The plaintiffs are unaware of any failure to obtain clearance of those judgeships and never have sought any injunction against them. The district court has been informed of the plaintiffs' position on this. (J.S. App. 51a, n.73). Other than the judgeships from the 17th and the 32nd, all of the judgeships listed in Part I of the October 22 order as well as Division B of the 20th district have been the subject of an objection by the Attorney General. (J.S. App. 121a-126a).

126a). The district court said, however, that the preclearance in 1981 of Act 3 of 1981, which added designated divisions to the *other* Circuit Courts of Appeal automatically precleared designated divisions in the First Circuit. (*Id.* at 52a and n. 74) (The letter submitting Act 3 of 1981, along with relevant excerpts from the act itself and the Attorney General's preclearance letter, were introduced as exhibit D-6, 9/28/90 hearing, and are reproduced in J.A. 153).

• The Attorney General also objected to the at-large circuitwide election of one Court of Appeal judgeship in the Second Circuit and one in the Third Circuit, both created by Act 114 of 1975. (J.S. App. 126a). Nevertheless, the district court said these judgeships had been automatically precleared by the Attorney General's 1981 approval of Act 3 of 1981, which added a number of judgeships to the various circuits of the Courts of Appeal. (*Id.* at 51a-52a). Act 3, however, did not add any new circuitwide at-large judgeships to the Second Circuit, but only added some new judgeships to be elected from smaller districts within the circuit. Moreover, Act 3 added no new judgeships at all to the Third Circuit. (J.A. 158-159).[3] Thus, the at-large circuitwide judgeships were retroactively cleared, according to the district court, by the clearance of a later act that added no new circuitwide judgeships.

• Act 635 of 1979, which split the old 10th judicial district into the new 10th and the new 39th, was also the subject of the Attorney General's objection. (J.S. App. 122a, 154a-156a, 163a). The district court nevertheless concluded that "the Attorney General specifically pre-

[3] The State's letter submitting Act 3 of 1981 for preclearance identified the changes from prior law that were brought about by Act 3. (J.A. 157-163). Some confusion may be generated by the chart in that letter which also identified judgeships created by Act 661 of 1980. (*Id.* at 158-159). However, as the letter stated, Act 661 of 1980 was never implemented and was repealed by Act 3 of 1981. (*Id.* at 160). Thus, the judgeships created by Act 661 are irrelevant.

cleared the division of the 10th and 39th Judicial Districts into two separate districts when he approved judicial positions for both districts." (*Id.* at 52a). However, no evidence was presented to indicate that the Attorney General precleared judicial positions in either district. Act 635 (reproduced in relevant part in the appendix to this brief) provided for a special referendum election among the voters of the old 10th judicial district to approve the split, and provided that if voter approval was obtained, the two existing judges would remain with the 10th and a new judge would be added in the 39th. The only preclearance relative to the two districts came in the Attorney General's letter of November 13, 1979, which by its terms precleared only "the special election for the Tenth Judicial District" called to obtain voter approval for the split and nothing else. (J.A. 101). The State defendants never put into evidence the submission letter accompanying Act 635. The stipulated chart filed with the district court shows that no additional judgeships have been created or approved in either the 10th district or the 39th district since Act 635 of 1979. (*Id.* at 214-215, 220).

• Also included within the Attorney General's objections was Act 34 of the Special Session of 1981, which added the judgeship in Division B to the 20th judicial district. (J.S. App. 122a). (Act 34 is reproduced in the appendix to this brief). However, the district court said that exhibit D-4 in the court below "clearly shows that the split of District 20 into two parishes and the creation of Division B was expressly submitted and approved by the Attorney General." (J.S. App. 53a). Exhibit D-4 deals with the submission of Act 568 of the 1981 regular session, which provided for a referendum to obtain voter approval for the split of the old 20th judicial district into the new 20th and the new 40th, and the creation of a judgeship for the new 40th. (J.A. 117).[4] As noted in

[4] Actually, there are two exhibits D-4, one from the September 28, 1990 hearing and the other from the October 18, 1990 hearing.

the Attorney General's October 19, 1981 response to the preclearance submission—also part of exhibit D-4—the proposition did not receive voter approval in the October 17 referendum and the Attorney General therefore made no preclearance determination. (*Id.* at 118). Thus, exhibit D-4 does not indicate preclearance of anything relative to the 20th judicial district. After the defeat of that referendum, the legislature enacted Act 34 of the 1981 special session which left the old 20th judicial district intact and added Division B. It was approved by the Governor on November 19, 1981. The act was not submitted for clearance until after the institution of this litigation, and as noted earlier, was the subject of the Attorney General's objection. (J.S. App. 122a).

In those four situations, as well as in the large number of situations involving uncleared at-large judgeships in districts where subsequently created at-large judgeships were submitted and precleared, the district court's decision invalidated the Attorney General's objections under Section 5.

B. The District Court's Ruling Permitting Elections For Judgeships It Conceded Had Not Been Cleared.

With respect to the remainder of the judgeships to which the Attorney General objected, all in districts where no other seats subsequently were created or precleared, the district court held that the failure to obtain clearance violated Section 5.[5] Despite the absence of clearance,

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Exhibit D-4 from the September 28 hearing contains the submission letter for Act 568 of the 1981 regular session, the act itself, and the Attorney General's October 19, 1981 response to the submission. (J.A. 117, 120, 127). Exhibit D-4 from the October 18 hearing is another copy of the Attorney General's October 19, 1981 response to the submission, with no other documents attached. (J.A. 205).

[5] Those judgeships are listed in Part II of the district court's October 22 order. (J.S. App. 72a-73a). However, the district court mistakenly included Division D of the 34th district, which has in fact been precleared as acknowledged by this Court's November 5

however, the district court said elections for those same judgeships could proceed as scheduled, with the winners being permitted to take office and serve "provisionally." The district court gave the State ninety days to file a declaratory judgment action seeking clearance in the District of Columbia (or to persuade the Attorney General to reconsider and grant clearance), with the winning candidates remaining in office during the course of the litigation in the District of Columbia. If the State loses the litigation, said the district court, those judges will continue in office for 150 days "after the finality of judgment in that case." If the State prevails, the judges may serve their full terms. (J.S. App. 74a-77a).

C. Subsequent Proceedings.

On October 29, 1990, the plaintiffs filed an application for injunction pending appeal in this Court. The application was granted in part on November 2, 1990, and the Court enjoined the November 6 and December 8 elections for those seats the district court conceded were uncleared. *Clark v. Roemer*, 111 S.Ct 376 (1990). The Court did not grant the application insofar as it sought to prevent the State from permitting people to take office who had already won election to uncleared seats either by being unopposed or having been chosen in the October 6 election that the district court permitted to occur. In addition, the application was not granted insofar as it sought to enjoin elections for those seats to which the Attorney General had objected but which the district court said had been automatically cleared by the preclearance of subsequent or related voting changes in the same districts. This Court conditioned the injunction

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modification of its November 2 injunction pending appeal. *Clark v. Roemer*, 111 S. Ct. 399 (1990). In addition, Division B of the 6th District has since been precleared by the Attorney General on November 20, 1990. (J.S. App. 184a). All of the other judgeships listed in Part II are the subject of the Attorney General's Section 5 objections. (*Id.* at 121a-125a, 132a, 166a-167a, 180a).

upon the timely filing of a jurisdictional statement appealing the district court's orders. The jurisdictional statement was filed December 14, 1990, and this Court noted probable jurisdiction on January 18, 1991.

Meanwhile, on January 11, 1991, the three-judge district court entered an order permitting incumbents to hold over in the offices for which this Court enjoined elections, and permitting any vacancies in those seats to be filled by appointment pursuant to Louisiana law. The order allows the incumbents or their appointed replacements to stay in office until 150 days after the conclusion of any litigation in the District of Columbia. (J.A. 268).

On January 19, 1991, the State of Louisiana filed a Section 5 declaratory judgment action in the United States District Court for the District of Columbia seeking clearance of the judgeships which the federal district court in Louisiana held not to have been cleared. *State of Louisiana v. United States*, No. 91-0122 (D.D.C.). The filing came on the next to last day of the 90-day deadline set by the October 22 order of the federal district court in Louisiana.

As for the Section 2 claims in the Louisiana litigation, they were dismissed by the single-judge district court in conformity with the en banc Fifth Circuit decision in *LULAC*. The plaintiffs noticed an appeal to the Fifth Circuit, and then filed in this Court a petition for certiorari before judgment in the Court of Appeals. *Clark v. Roemer*, No. 90-898. The petition is pending. Meanwhile, on January 18, 1991, this Court granted four petitions for certiorari growing out of two separate cases to decide the applicability of Section 2 to judicial elections, and the resolution of those cases will directly affect the Section 2 claims in the present case. *Chisom v. Roemer*, No. 90-757 (consolidated with) *United States v. Roemer*, No. 90-1032; *Houston Lawyers' Association v. Attorney*

General of Texas, No. 90-813 (consolidated with) *LULAC v. Attorney General of Texas*, No. 90-974. The constitutional claims in the present litigation are still pending before the single-judge district court, which has stayed proceedings on those claims until the applicability of Section 2 is resolved by this Court.

SUMMARY OF ARGUMENT

1. By its holding that preclearance of voting changes also cleared prior and related changes in the same election district, the district court nullified many of the Attorney General's objections. This was based on the district court's conclusion that the Attorney General's preclearance of a voting change "not only approves the amended portion [of a statute] but necessarily approves the older, reenacted part, which forms part of the new act." (J.S. App. 27a). That conclusion is directly contradicted by this Court's decision in *McCain v. Lybrand*, 465 U.S. 236 (1984), which said that "submission of a particular change does not encompass all prior changes—precleared or not—that have been made since the Act's effective date in 1964." *Id.* at 255, n.26. *McCain* requires deference be paid to the Attorney General's determination in this case that preclearance of various voting changes did not clear earlier changes, but the district court ignored the Attorney General's view. If the district court's reasoning were to prevail, discriminatory voting changes would go undetected. Covered jurisdictions would be encouraged to withhold submission of discriminatory changes, instead waiting to obtain preclearance of later and more innocuous changes that would retroactively clear the earlier, discriminatory measures. The Attorney General's enforcement responsibilities would be seriously undermined inasmuch as each submission would require a search into all prior and related voting changes in the election district, no matter how many, to determine if they were precleared.

2. This Court never has held that a district court may allow elections to proceed pursuant to voting changes

falling clearly within Section 5's preclearance requirement and to which the Attorney General has objected. Yet the district court did just that. It concluded, in effect, that Section 5 objections by the Attorney General may be suspended and uncleared changes may be implemented for as long as it takes the covered jurisdiction to litigate a declaratory judgment action in federal district court in the District of Columbia. The district court's error is apparent from the fact that this Court, in the present case and in prior cases, has itself enjoined elections in order to enforce the Attorney General's Section 5 objections. This is in accord with prior decisions of this Court stating very clearly that uncleared changes may *not* be implemented. No decision of this Court has modified that principle simply because of the pendency of Section 5 litigation in the District of Columbia.

3. Because of the district court's errors, several illegal elections occurred that should not have occurred. Given that preclearance already has been sought from the Attorney General and denied, *NAACP v. Hampton County Election Commission*, 470 U.S. 166, 182-183 (1985) requires that the results of the illegal elections be set aside. The case should be remanded to the district court for the imposition of any further relief that is necessary. However, this Court should impose a time limit beyond which the district court may not permit the continuing operation of the uncleared judgeships in the absence of a lawful election plan. Otherwise, the district court will allow the judgeships to remain filled during the entire time it takes to litigate the Section 5 declaratory judgment action in the District of Columbia. None of this Court's cases suggest that a jurisdiction may continue to implement voting changes to which the Attorney General already has objected simply because the jurisdiction is pursuing a declaratory judgment action. That course of action will delay too long the enforcement of Section 5 and will reward Louisiana officials for their dilatory conduct in failing to initiate that litigation sooner.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT PRECLEARANCE OF VOTING CHANGES AUTOMATICALLY CLEARS PRIOR AND RELATED VOTING CHANGES IN THE SAME JUDICIAL DISTRICT.

Section 5 provides that any voting change in a covered jurisdiction such as Louisiana may not be implemented until the jurisdiction obtains preclearance from the Attorney General or a declaratory judgment from the United States District Court for the District of Columbia stating that the change has no discriminatory purpose or effect. *Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982). This Court has held that the creation of new elected judgeships is a voting change that must be precleared under Section 5. *Brooks v. Georgia State Board of Elections*, No. CV 288-146 (S.D. Ga. Dec. 1, 1989) (three-judge court), *aff'd mem.*, 111 S.Ct. 288 (1990); *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985) (three-judge court), *aff'd mem.*, 477 U.S. 901 (1986).

In the present case, the district court held that a number of judicial election voting changes to which the Attorney General objected had already been cleared because of the preclearance of subsequent or related voting changes in the same judicial districts. In so doing, the district court nullified most of the objections made by the Attorney General in his September 23, 1988 and May 12, 1989 objection letters. The district court based its holding on the following rationale:

> When the Attorney General approves the new act, he not only approves the amended portion but necessarily approves the older, reenacted part, which forms part of the new act. Thus, when an act provides for a certain number of judicial positions, approval of that act must include all of the judicial positions necessary to reach that number.

(J.S. App. 27a-28a).

The district court applied this rule to cover the Attorney General's objections to all at-large judgeships in districts where subsequently created at-large judgeships already had been precleared. In addition, the district court nullified the Attorney General's objections to four other Louisiana acts that do not fit this same pattern. (J.S. App. 51a-52a). Those are described earlier in this brief at pages 7-10, and will be discussed again later in this section of the brief. First, however, it is important to address the validity of the rule itself inasmuch as it is the basis for the district court's mass cancellation of the Attorney General's objections.

In *McCain v. Lybrand*, this Court explicitly rejected the type of rule upon which the district court based its decision in the present case, and unanimously held that the failure to preclear a voting change was *not* cured by preclearance of a second voting change even though the second change specifically reenacted the provisions included within the first. In fact, the second change in *McCain* was very similar to the subsequent changes in the present case in that it increased from three to five the number of seats and the number of residence districts within an existing at-large election system. 465 U.S. at 240. Justice Stevens' opinion for six members of the Court said, "submission of a particular change does not encompass all prior changes—precleared or not—that have been made since the Act's effective date in 1964." *Id.* at 255, n.26. The opinion added:

> When a jurisdiction adopts legislation that makes clearly defined changes in its election practices, sending that legislation to the Attorney General merely with a general request for preclearance pursuant to Section 5 constitutes a submission of the changes made by the enactment and cannot be deemed a submission of changes made by previous legislation which themselves were independently subject to Section 5 preclearance.

Id. at 256. *McCain*, therefore, directly contradicts the district court's holding here that preclearance by the

Attorney General "not only approves the amended portion [of a statute] but necessarily approves the older, reenacted part, which forms part of the new act." (J.S. App. 27a).

The district court's opinion attempted to distinguish *McCain* by referring to various Louisiana acts and submission letters:

> [We] find that there was express approval by the Attorney General for those judicial positions set forth in Part I of our October 22, 1990 order. The language of the various acts submitted to the Attorney General, as well as the letters submitted by the State of Louisiana seeking preclearance, support this conclusion. Thus, the change submitted to the Attorney General is not only the amendment, but the entire act as passed by the legislature.

(J.S. App. 25a-27a, footnotes omitted). In a footnote to the second of the three sentences just quoted, the district court described the language of the Louisiana acts and the submission letters in evidence:

> In the submission to the Attorney General, the Act submitted, and in most cases the letter of submission, clearly and expressly states that the number of judges in a particular district is being increased from one number to another. This procedure is clearly distinct and different from the facts set forth in McCain v. Lybrand . . . .

(J.S. App. 26a, n.38).

Contrary to the district court's view, this in no way distinguishes *McCain*. Just as the acts and some of the submission letters in the present case stated that the number of judges in a given district was being increased from one number of another (such as six to seven), the subsequent legislation actually precleared by the Attorney General in *McCain* described the change from three council members to five. 465 U.S. at 240.

Thus, the district court erred as a matter of law when it concluded that a description of the change from one number of judges to another in a particular judicial district is sufficient under Section 5 to submit to the Attorney General all prior voting changes incorporated in the newly amended statute pertaining to the particular judicial district. *See McCain*, 465 U.S. at 258 (stating that a similar district court ruling in that case was error "as a matter of law").

Moreover, nothing in the factual record indicates that the State's occasional submissions of various judgeships for preclearance prior to this lawsuit were accompanied by, or specifically included, requests for clearance of earlier uncleared voting changes in the same judicial districts. Only five submission letters were put into the record by the defendants, and they are reproduced in the Joint Appendix. (J.A. 105, 110, 120, 151, 155).[6] Of those, two did not give any description of the voting changes being made, but simply announced that the acts were being submitted for preclearance. (J.A. 105-106, 151-152).[7] The other three described the particular changes encompassed in the acts submitted by noting, for example, the changes in the "1st Judicial District, from 8 to 9 judges." (J.A. 111-114, 121-124, 157-163).[8] None of them informed the Attorney General of prior voting changes that were uncleared and were being submitted along with the new voting changes. In the absence of such information, according to *McCain*, the submissions of the new changes cannot be deemed submissions of prior

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[6] These five submission letters are included in exhibits D-2, D-3, D-4, D-5, and D-6 of the September 28, 1990 hearing.

[7] These are in exhibits D-2 and D-5 from the September 28 hearing.

[8] These are in exhibits D-3, D-4, and D-6 from the September 28 hearing.

changes in the same districts. *Id.* at 256-257. In the event the district court's ruling on this point is considered a finding of fact, it is clearly erroneous.

Apparently, the district court in the present case failed to understand that when an act changes the number of judges from six to seven, or the number of council members from three to five as in *McCain*, the Attorney General is called upon only to examine the evidence of discriminatory intent and impact surrounding that specific change. The Attorney General is not called upon to examine all prior changes in the election system that happen to be recodified by the new act, such as those changing from one at-large judgeship to two, two to three, three to four, and so on. As this Court said in *McCain*, "the preclearance procedures mandated by § 5 of the Voting Rights Act focus entirely on *changes* in election practices" that are submitted to the Attorney General. 465 U.S. at 251 (emphasis in original).

McCain also emphasized that deference should be given to the United States Department of Justice when it determines that its preclearance of later legislation did not clear earlier legislation. *Id.* at 255-256. Here the Justice Department's Section 5 objections and its *amicus curiae* position in this litigation demonstrate that the Attorney General did not and does not intend for the preclearances of later legislation creating judgeships in Louisiana to have encompassed earlier voting changes in the same judicial districts. By ignoring the Justice Department's position, the district court substituted its judgment for that of the Attorney General in holding that the later preclearances incorporated the earlier changes.

In addition, the State of Louisiana's own actions demonstrate that its officials did not believe the unprecleared voting changes to have been later cleared by the

Section 5 approval of other voting changes. Once the plaintiffs moved in 1987 to amend their complaint to include all of the unprecleared judicial voting changes they had uncovered, the State submitted those changes to the Attorney General for Section 5 clearance (J.S. App. 109a-110a), after which the Attorney General interposed his objections. Had State officials truly believed that most of those voting changes were already retroactively cleared, there would have been no reason to submit them for clearance. Only when the plaintiffs moved to enjoin the elections for uncleared judgeships during the 1990 statewide election cycle did the State defendants offer this belated contention that the voting changes already had been cleared.

Not only does the district court's decision contravene the holding of *McCain v. Lybrand*, but it also conflicts with this Court's affirmance of *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985) (three-judge court), *aff'd mem.*, 477 U.S. 901 (1986). In *Haith*, a 1967 North Carolina act (Chapter 997) added one judgeship to each of four judicial districts and was implemented without being submitted for preclearance. 618 F.Supp. at 412. The State defendants there claimed those same judgeships had also been included in later legislative enactments that were precleared. *Id.* The district court in *Haith*, citing *McCain v. Lybrand*, said the later preclearance made no difference and enjoined elections for the judgeships in question. *Id.* at 413-414. The issue of the subsequent preclearance was raised by the State defendants in their jurisdictional statement in that case (no. 85-1066, J.S. at 20-21), yet this Court affirmed the lower court without opinion. 477 U.S. 901 (1986).

With the passage of Section 5, Congress intended to provide a mechanism for review of all voting changes in the covered jurisdictions in order to prevent racial discrimination. The holdings in *McCain* and *Haith v. Martin* are in keeping with that intent. By contrast, the

district court's reasoning in the present case would permit potentially discriminatory voting changes to go unreviewed and uncorrected. Consider, for example, the district court's statement that the preclearance of the creation of a seventh judgeship in a judicial district would necessarily approve the previous six. (J.S. App. 25a). A covered jurisdiction may decide to expand the number of judges elected at-large in a majority white district from one to six rather than divide that district into two smaller judicial election districts, one majority black and one majority white, and may do so with the stated discriminatory purpose of preventing the election of black judges. If the changes from one to six are implemented and not submitted, the Attorney General will have no way of reviewing the evidence of discrimination. If years later a seventh judge is added without discriminatory purpose and is submitted, the Attorney General will be confronted only with the change from six to seven. There will be no indication to the Attorney General that the evidence of discrimination surrounding the prior changes should be examined. Yet, under the district court's rule, the preclearance of the nondiscriminatory change from six to seven automatically would preclear the prior discriminatory changes. "[T]he purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him." *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110, 136 (1978).

Indeed, the District Court's rule would encourage jurisdictions to forego the submission of discriminatory election changes for preclearance, comfortable in the knowledge that the measures later could be silently cleared through the submission of subsequent and more innocuous changes.

The district court's rule also would seriously hamper the Attorney General's discharge of his Section 5 re-

sponsibilities. With each submission of a voting change, the Attorney General would be required to go back and determine whether all prior changes in that voting district had been submitted for preclearance. If some had not been precleared, examination of those changes would be necessary even though the covered jurisdiction had not submitted the prior changes. That would be too great a burden for the Attorney General, who already must review thousands of voting changes each year. Moreover, it would become extremely difficult for the Attorney General to dispose of these thousands of changes within the sixty days prescribed by Section 5, thus impinging upon what Congress intended as a "speedy alternative method of compliance" that would enable covered jurisdictions to avoid frequent litigation in the District of Columbia. *Morris v. Gressette*, 432 U.S. 491, 503 (1977). Section 5 places upon the covered jurisdictions the responsibility of submitting to the Attorney General voting changes, and informing the Attorney General of the nature of those changes. *McCain v. Lybrand*, 465 U.S. at 249. The district court's decision reverses that principle, and is inconsistent with the structure and the efficient enforcement of the Act.

In addition, it is important to note that the district court's rule is very expansive, covering not only prior judgeships added to existing election districts, but *all* voting changes that are later reincorporated into a statute for which the Attorney General approves any amendment.

In fact, the district court invoked its rule (J.S. App. 51a-52a) in the course of automatically clearing changes that had little relationship to the subsequent changes actually considered and precleared by the Attorney General:

- As noted earlier, the district court held that the otherwise uncleared enactment of designated divisions (or posts) for the First Circuit was automatically cleared by the later approval of designated divisions in other circuits. (J.S. App. 51a-52a and n.74; see pages 7-8 of this brief). However, the Attorney General never had the opportunity prior to that time to evaluate the impact of designated posts as applied to the specific situation in the First Circuit. Once the State finally gave him that opportunity by submitting the voting change, the Attorney General concluded that the designated divisions were discriminatory in light of the particular demographics of the First Circuit. (J.S. App. 112a-113a).

- Similarly, the district court held that the otherwise uncleared creation of at-large circuitwide judgeships in the Second and Third Circuits was automatically cleared by the approval of a later act creating new Court of Appeals judgeships from smaller districts within the Second Circuit and creating no new judgeships in the Third Circuit. (J.S. App. at 52a; see page 8 of this brief). In that situation, the Attorney General never had the opportunity to evaluate the change caused by the earlier creation of judgeships elected at-large from the entire Second Circuit and the entire Third Circuit.
- In addition, the district court said the split of the 10th and 39th districts was cleared when the only preclearance involved the Attorney General's approval of the holding of a referendum election proposing the changes. (See pages 8-9 of this brief). This is in direct conflict with *United States v. Board of Commissioners of Sheffield*, 435 U.S. at 137, in which this Court said preclearance of a referendum election does not necessarily constitute approval of the underlying change proposed in the referendum.
- One other mistake was made by the district court. It held that Division B of the 20th judicial district had been precleared because of a Section 5 submission regarding a referendum to consider splitting the 20th district and providing a new judge to sit in the new district. The referedum failed and the Attorney General therefore made no preclearance

determination at all. Division B was passed later and never submitted for preclearance. (See pages 9-10 of this brief).

These four instances indicate the extent to which the District Court's rule can lead to a perversion of Section 5. While each of the instances constitutes an error under Section 5, the appellants are of the view that this Court need not address them individually. Instead, it will suffice for this Court to reverse the district court because of its reasoning and vacate the judgment below, leaving the district court to sort out on remand the factual details surrounding each of these judgeships.

For all of these reasons, the district court's ruling on this issue should be reversed.

II. THE DISTRICT COURT ERRED IN PERMITTING ELECTIONS TO GO FORWARD PURSUANT TO UNCLEARED VOTING CHANGES TO WHICH THE ATTORNEY GENERAL OBJECTED UNDER SECTION 5.

When Congress passed the Voting Rights Act of 1965, it included Section 5 as a key weapon in the battle to stop what this Court called the "insidious and pervasive evil" of racial discrimination in voting that "had been perpetuated in certain parts of our country." *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

> To prevent any future circumvention of constitutional policy, Congress adopted Section 5 which provides that whenever a designated State or political subdivision wishes to change its voting laws, it must first demonstrate to a federal instrumentality that the change will be nondiscriminatory. By freezing each covered jurisdiction's election procedures, Congress shifted the advantages of time and inertia from the perpetrators of the evil to its victims.

United States v. Board of Commissioners of Sheffield, 435 U.S. at 121.

By ordering elections to proceed even for judgeships it conceded should have been precleared and were not, the district court shifted the advantages of time and inertia back to the State of Louisiana and placed the burden of delay on the voters whom Section 5 was intended to protect. Even though the Attorney General, in fulfilling his Congressionally authorized responsibility, determined that these voting changes were racially discriminatory, the district court allowed the state to continue implementing the changes.[9] Indeed, the district court holding permits the state to enforce the changes for the entire time it takes to litigate to conclusion the declaratory judgment action in the District of Columbia.

There is no authority for the district court's action. This Court never has said that a district court may permit elections to go forward in circumstances where it is conceded that Section 5 applies and where the Attorney General has interposed a valid objection. To the contrary, the Court itself has enjoined elections in such situations in the wake of district court failures to do so. It did so in the present case, which strongly indicates that the district court erred, and it has done so in the past. *See, e.g., Canady v. Lumberton County Board of Education*, 454 U.S. 957 (1981); *Holt v. City of Richmond*, 406 U.S. 903 (1972). Indeed, an injunction has issued even where the Attorney General has yet to make a preclearance decision. *Lucas v. Townsend*, 486 U.S. 1301 (1988) (Kennedy, J., in chambers).[10]

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[9] Neither the district court in Louisiana nor this Court on appellate review has the authority to second-guess the Attorney General's substantive determination. *United States v. Board of Supervisors of Warren County*, 429 U.S. 642, 645-646 (1977).

[10] In *Georgia v. United States*, 411 U.S. 526 (1973), the Attorney General objected to a state legislative redistricting plan, the district court enjoined use of the plan, and this Court stayed enforcement of the injunction pending appeal. *Id.* at 528. However, in that case, questions existed about whether Section 5 covered legislative redistricting plans and whether the Attorney General's objections

These injunctions are in keeping with the clear statements of the Court to the effect that uncleared changes are unenforceable. "No new voting practice or procedure may be enforced unless the State or political subdivision has succeeded in its declaratory judgment action or the Attorney General has declined to object." *United States v. Board of Supervisors of Warren County*, 429 U.S. 642, 645 (1977). Uncleared changes "are not now and will not be effective as laws until and unless precleared pursuant to Section 5." *Connor v. Waller*, 421 U.S. 656 (1975). "[T]he change in election procedure is subject to Section 5, and the . . . *courts may not further implement that change* until the parties comply with Section 5." *Hathorn v. Lovorn*, 457 U.S. at 270 (emphasis added).

This principle never has been modified by the Court simply because of the pendency of a preclearance request, whether with the Attorney General or the federal district court in the District of Columbia. To the contrary, the election in *Lucas v. Townsend* was enjoined even though a Section 5 submission was pending before the Attorney General and the possibility existed that preclearance would be granted within less than two months. *Lucas v. Townsend*, 486 U.S. at 1303.

All of this is settled law, yet it was ignored by the district court. According to the district court, its reasons for permitting the elections to occur despite the Attorney General's objections included its uncertainty about the applicability of Section 5, its concern about the impact of an injunction on the Louisiana justice system, and its reluctance to enjoin elections once qualifying and campaigning already had occurred. (J.S. App. 31a-37a). These are addressed in turn.

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were timely. Neither of those situations exists here with respect to the judgeships the district court conceded were uncleared. Furthermore, once *Georgia v. United States* was heard on the merits and this Court determined Section 5 was applicable, the Court ordered that no further elections proceed under the plan.

The district court said uncertainty existed about the applicability of Section 5 until this Court issued its summary affirmance of *Brooks v. State Board of Elections* on October 15, 1990, after all elections had been scheduled and after the October 6 primary had occurred. The district court's analysis ignored *Haith v. Martin*, which involved legislation that included a statute adding new judgeships to pre-existing judicial districts. 618 F. Supp. at 412-413. There, the district court held that preclearance was required for the addition of the new judgeships, and this Court affirmed. 477 U.S. 901 (1986). *Brooks* simply reconfirmed the principle of *Haith v. Martin*. Thus, the law has been clear for years and provides no justification for the district court's failure to enforce Section 5. Moreover, even if there had been confusion prior to *Brooks*, once that decision was issued the three-judge court should have immediately enjoined all further elections and brought the illegal process to a halt.

While the district court was concerned about the functioning of the Louisiana justice system, there was no reason to believe that simply enjoining the elections would cause substantial harm to the system. For instance, the district court could have permitted incumbents to hold over for a period of time sufficient to allow the Louisiana legislature to adopt and preclear a new election plan that would satisfy Section 5. Moreover, the administrative difficulties incurred by a jurisdiction as a result of objections from the Attorney General under Section 5 are no excuse for failing to enforce those objections.

The district court also justified its failure to act by noting that qualification and campaigning already had begun. In that connection, the district court said, "qualifying for some of these judicial positions had begun before any hearing was requested to enjoin these elections." (J.S. App. 32a). The court added this: "While the Court does not intend to place the blame on any one

party, the request for an injunction of the unprecleared judicial positions came very close to the October 6 election day." *Id.* at 33a-34a.

Clearly, the Court did not deny the motion for injunction because of its timing inasmuch as it did not "place the blame on any one party." Had it done so, it would have committed error. The fourth amended complaint, raising the Section 5 violations now at issue, was filed over three years ago, on July 30, 1987. (J.A. 15). The complaint specifically requested that the three-judge court hear the Section 5 claims, and requested an injunction against enforcement of all of the unprecleared changes. (*Id.* at 40). When the fall, 1988 election approached, the plaintiffs moved to enjoin scheduled elections for all uncleared seats (*id.* at 42), and the three-judge court granted the injunction. (J.S. App. 98a). Despite this prior injunction, State officials went ahead with candidate qualification in July of 1990 in direct violation of Section 5. As soon as the plaintiffs learned of this, they filed on July 23, 1990 their motion to enjoin the elections. (J.A. 48).

Thus, all parties and the district court have been on notice for years of the Section 5 claims and the plaintiffs' contention that elections for unprecleared seats should not be permitted. The plaintiffs sought and received an injunction in September of 1988, and as soon as they learned of the plans to hold elections for unprecleared seats in 1990, they filed another injunction motion well over two months prior to the October 6 primary. There was no lack of diligence sufficient to deny an injunction. *See, Lucas v. Townsend*, 486 U.S. at 1302 (injunction pending appeal granted even though an injunction from the district court was sought only a few days prior to the election).

Indeed, it was the State officials who created the problem by scheduling qualification and elections for seats to

which Section 5 objections had been lodged, and doing so without informing or seeking the permission of the three-judge court. The three-judge court exacerbated the problem by permitting the October 6 elections to occur provisionally, and also opening candidate qualification on October 3-5 for a whole new set of elections for uncleared seats. In effect, the district court created its own set of exigencies by allowing the election process to go forward provisionally, and then used those exigencies to justify completing the process, holding the elections, and letting the winners take office.

In support of its decision to allow the elections to proceed, the district court cited a number of cases. (J.S. App. 39a-47a). All are inapposite. In *Perkins v. Matthews*, 400 U.S. 379 (1971), *NAACP v. Hampton County Election Commission*, 470 U.S. 167 (1985), *Berry v. Doles*, 438 U.S. 190 (1978), and *Georgia v. United States*, 411 U.S. 526 (1973), elections already had been held, the winners had been in office for some time, and the only question before this Court was whether the elections should be set aside.[11] That is a different question from whether they should be held in the first place. Moreover, in all of those cases, this Court said that no future elections could be held under the unprecleared changes. *See, e.g., Perkins v. Matthews*, 400 U.S. at 397; *Georgia v. United States*, 411 U.S. at 541.

As for the district court's citation of *United States v. County Commission of Hale County, Alabama*, 425 F. Supp. 433, 436 (S.D. Ala. 1976) (three-judge court), *aff'd mem.*, 430 U.S. 924 (1977) (J.S. App. 44a), it is

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[11] As previously noted, this Court initially stayed a lower court injunction against an unprecleared state legislative election plan in *Georgia v. United States*, because of uncertainty over whether Seciton 5 was applicable and whether the Section 5 objection at issue was timely. On appeal of the merits, however, this Court found that the district court was correct and ordered reimposition of the injunction. 411 U.S. at 541.

not controlling because the district court's order permitting elections to go forward in that case despite the absence of preclearance was never appealed to this Court. The only appeal taken was by the county defendants who challenged the applicability of Section 5. (See the jurisdictional statement in No. 76-772). Thus, the district court here was incorrect when it said *Hale County* involved a situation where "the United States Supreme Court approved an order very similar to that issued by this court." (J.S. App. 44a).

Finally, in *Oden v. Brittian*, 396 U.S. 1210 (1969), cited by the three-judge court here (J.S. App. 44a-45a), Justice Black denied a stay because he said the substantive "legal issues are unclear," and because the three-judge district court had yet to consider the request for an injunction. *Id.* at 1211-1212. Neither of those circumstances apply in the present case.

Thus, none of the reasons given and none of the cases cited by the district court justify the district court's decision on this point.

As noted earlier, the law is very clear. Voting changes to which the Attorney General has objected may not be enforced. The district court's decision permitting elections to proceed is in error.

III. THE ELECTIONS THAT OCCURRED PURSUANT TO UNCLEARED CHANGES SHOULD BE SET ASIDE, AND THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR CONSIDERATION OF ANY FURTHER RELIEF THAT MAY BE NECESSARY.

Because of the district court's errors, elections occurred that never should have occurred. Although this Court enjoined elections scheduled November 6 and December 8 for judgeships the district court conceded to be uncleared, candidates nevertheless were elected to and are serving in some of those judgeships because they were

unopposed or won on October 6 without the need for a November 6 runoff. In addition, the district court let elections go forward for those judgeships it deemed to have been cleared because of the clearance of subsequent voting changes.

Assuming the district court is reversed on the substantive issues in this case, the next question is what should be done about those elections that the district court improperly allowed to occur. For reasons explained below, the appellants suggest that the district court be ordered to set aside the illegal elections, and that the case be remanded to the district court for the consideration of further remedial relief. However, the district court should also be instructed that if it permits continued operation of the uncleared judgeships, it may do so only for a limited period of time (not past January 1, 1992) unless a new plan for election has been implemented that satisfies Section 5.

In *NAACP v. Hampton County Election Commission*, this Court ordered the following relief:

> [I]t is appropriate in these circumstances for the District Court to enter an order allowing appellees 30 days in which to submit these changes to the Attorney General for approval . . . . [*I*]*f approval is not forthcoming*, the results of the March, 1983 election *should be set aside.*

470 U.S. at 182-183 (emphasis added). Preclearance had yet to be sought from the Attorney General in *Hampton County* because of a contention that the voting change was not covered by the Act. By contrast, in the present case, approval from the Attorney General was sought and denied over two and a half years ago, and reconsideration for the judgeships at issue has been sought and denied. Thus, the Attorney General's approval is not forthcoming, and pursuant to *Hampton County*, the elections should be set aside.

Once the elections are set aside, the matter should be remanded to the district court to consider what additional relief may be necessary in light of the rights of the plaintiff class to elections that satisfy Section 5 and the interests of the State in the keeping these judgeships operative.[12] However, this Court should set a time limit beyond which the uncleared judgeships must be declared vacant unless elections have been held curing the Section 5 objections.

A time limit is necessary so the district court will not permit the State to operate the uncleared judgeships until the conclusion of the District of Columbia litigation. The district court already provided in its October 22, 1990 order that judges elected to uncleared judgeships may stay in office until 150 days after that case is terminated. In its recent January 11, 1991 order, the district court said incumbents and appointees may hold office in the judgeships under that same timetable. (J.A. 268).

For the district court to adhere to that timetable on remand would simply replicate the error the district court made in the first place when it permitted elections to go forward, and would suspend for years the enforcement of the plaintiffs' rights provided by Section 5.[13] Louisiana would continue to benefit by having implemented judge-

[12] Among other things, the district court can determine in the first instance whether any special election relief is possible. *See, Hathorn v. Lovorn*, 457 U.S. at 270.

[13] Section 5 declaratory judgment actions in federal district court in the District of Columbia generally take quite some time. In *City of Rome v. United States*, 450 F. Supp. 378, 379 (D.D.C. 1979) (three-judge court), nearly two years passed between the filing of the complaint and the rendering of a decision by the district court, and another year went by before this Court's disposition of the case. 446 U.S. 156 (1980). The same three-year total span was taken up by district court proceedings and the appeal to this Court in *City of Richmond v. United States*, 376 F. Supp. 1344, 1351 (D.D.C. 1974) (three-judge court), *vacated and remanded*, 422 U.S. 358 (1975).

ships for which it never obtained preclearance. There would be absolutely no reason in the meantime for the State to pass and preclear new legislation that would cause these judges to be elected consistent with Section 5.

Section 5 by its terms nowhere authorizes the implementation and maintenance of uncleared changes during the course of the entire District of Columbia litigation if the Attorney General already has found the voting changes to be racially discriminatory. While the decisions in *Hampton County, Perkins v. Matthews*, 400 U.S. at 396-397, and *Berry v. Doles*, 438 U.S. at 192-193, suggested that courts in some situations can hold off setting aside elections to give the covered jurisdiction an initial opportunity to seek clearance, all of those were cases in which clearance never had been requested because of a contention that the voting change was not covered. None of them stands for the proposition that election results can be implemented in the face of an Attorney General's objection while the jurisdiction litigates in the District of Columbia.[14] Indeed, in *Hathorn v. Lovorn*, where the Attorney General already had objected to the voting change, this Court's order delineating the remedial options to be considered by a lower court never mentioned the possibility of permitting the state to continue enforcing the change if it sought preclearance in federal court in the District of Columbia. 457 U.S. at 270.

The State of Louisiana had an opportunity to initiate a Section 5 declaratory judgment action back when the Attorney General first interposed his objections in Sep-

[14] Failing to set aside the elections in the present case would be equivalent to permitting the covered jurisdiction in *Hampton County* to seek the Attorney General's approval, and if approval is not forthcoming, then to seek clearance in federal court in the District of Columbia, all the while leaving the winners of the illegal election in office. In *Hampton County*, of course, this Court made no provision for such a course of action, instead specifying that the elections should be set aside upon the Attorney General's denial of clearance.

tember of 1988, two years prior to the 1990 elections. The State did not do so. Indeed, it did not file in the District of Columbia until its back was to the wall as a result of the district court's order in the present case, and then it did so only on the next to last day available under the district court's deadline. The State's dilatory tactics should not be permitted to delay the enforcement of Section 5. As this Court noted in *Perkins v. Matthews*, "Congress expressly indicated its intention that the States and subdivisions, rather than citizens seeking to exercise their rights, bear the burden of delays in litigation." 400 U.S. at 396.[15]

Moreover, if the judgeships continue to be implemented during the pendency of the District of Columbia litigation and the *winners of the illegal elections* are allowed to occupy those seats, the district court's error in permitting the elections to go forward will be uncorrected in any way, and *Hampton County*'s directive that the elections be set aside will go unheeded. Even if the winners are not allowed to stay in office, and the positions are filled using some other method of selection—such as appointment under state law—the State will continue to benefit from the initial unlawful implementation of these uncleared voting changes.[16] On the other hand, the plain-

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[15] Louisiana's record regarding compliance with Section 5 is not unblemished. The district court in this case made the following statement:

> The State of Louisiana has absolutely no excuse for its failure, whether negligent or intentional, to obtain preclearance of legislation when such preclearance is required by the Voting Rights Act of 1965. If this were the first time a three-judge court in the Middle District of Louisiana was confronted with the problem of hearing a suit seeking to enjoin an election because of the state's failure to obtain preclearance, the Court might avoid commenting on the matter.

(J.S. App. 7a, n.10).

[16] If the judgeships remain in operation, the winners should not be allowed to remain in office in light of *Hampton County's* directive that the elections be set aside. In that scenario, it would be necessary to fill the offices through some other means.

tiff class of black voters on whose behalf the Attorney General interposed the Section 5 objections will receive no relief during the pendency of the District of Columbia litigation inasmuch as the illegal judgeships will remain operational without any effort to cure the causes of the Section 5 objections. Section 5 requires more.

Thus, a time limit is necessary so that the enforcement of the Attorney General's Section 5 objections will not remain for years in limbo. A time limit of January 1, 1992 would give the district court an opportunity to consider the propriety of filling the seats through some method such as special elections. It also would provide an incentive and allow sufficient time for the legislature to go into special session to pass and preclear a new election plan providing for prompt elections. In the event this Court does not choose to specify a time limit, it should instruct the district court to set some time limit of its own so that these uncleared judgeships will not remain in operation for the entire length of the District of Columbia litigation.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the decision of the district court should be reversed.

Respectfully submitted,

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March 4, 1991

APPENDIX

APPENDIX

[From Louisiana Session Laws,
Regular Session of 1979]

ACT No. 635

Senate Bill No. 137. By: Mr. Kelly and Representative Fowler.

AN ACT

To amend and reenact the initial paragraph and Paragraph (10) of Section 477 of Title 13 of the Louisiana Revised Statutes of 1950, to amend said Section 477 by adding thereto a new Paragraph, to be designated Paragraph (39) thereof; to amend said Title 13 by adding thereto a new Section, to be designated as Section 621.39 thereof; to enact Paragraph (39) of Section 51 and amend and reenact Sections 241 through 244 all of Title 16 of the Louisiana Revised Statutes of 1950; to amend Chapter 2 of said Title 16 by adding thereto a new Part, to be designated Part XXXIX thereof and to be comprised of R.S. 16:901, all relative to the judicial districts of the state, to submit to the voters of the existing Tenth Judicial District, for their approval or disapproval, a proposition to divide the Tenth Judicial District, composed of the parishes of Natchitoches and Red River, by continuing the Tenth Judicial District composed of Natchitoches Parish and to establish the Thirty-Ninth Judicial District composed of Red River Parish; to provide for the continuation of the offices of the judges, district attorney, and assistant district attorneys of the Tenth Judicial District; to provide for the establishment of the offices of judge and district attorney of the Thirty-Ninth Judicial District and to authorize an assistant district attorney for said district; to provide for the election of a judge and a district attorney for the Thirty-Ninth

Judicial District; to provide for the additional salaries of the district attorneys of the Tenth and Thirty-Ninth Judicial Districts; to provide for the additional salaries of the assistant district attorneys of the Tenth Judicial District; to provide for the effective date of the division of the existing Tenth Judicial District and the establishment of the Thirty-Ninth Judicial District; to provide for the effectiveness of the Act; to provide with respect to matters generally and specifically related to the division of the Tenth Judicial District and the establishment of the Thirty-Ninth Judicial District; and to repeal Sections 245 and 246 of Title 16 of the Louisiana Revised Statutes of 1950 which were made obsolete by the placing of the language contained in those Sections in other provisions of law.

Be it enacted by the Legislature of Louisiana:

Section 1. The initial paragraph and Paragraph (10) of Section 477 of Title 13 of the Louisiana Revised Statutes of 1950 are hereby amended and reenacted, and Paragraph (39) of said Section 477 is hereby enacted, all to read as follows:

§ 477. Judicial districts

There shall be thirty-nine judicial districts in the state, the parish of Orleans excepted, and each district shall be composed as follows:

* * * *

(10) The parish of Natchitoches shall compose the Tenth District.

* * * *

(39) The parish of Red River shall compose the Thirty-Ninth District.

Section 2. Section 621.39 of Title 13 of the Louisiana Revised Statutes of 1950 is hereby enacted to read as follows:

§ 621.39. Thirty-Ninth judicial district

The Thirty-Ninth Judicial District Court shall have one judge.

* * * *

Section 6. There is hereby established the office of judge for the Thirty-Ninth Judicial District Court, to be composed of the parish of Red River as provided in this Act.

The judge herein provided for shall be elected at large from the parish of Red River.

The judge shall have the same qualifications and shall receive the same emoluments of office, compensation, and expense allowances, payable from the same sources and in the same manner, as is now or may hereafter be provided for the other judges of the district courts throughout the state.

The first judge elected to the judgeship shall be elected at the special election hereinafter provided for and shall serve for a term which shall expire at the same time as is provided by law for the other judges of the district courts throughout the state.

* * * *

Section 8. The governor, within fifteen days after the effective date of this Section, shall call a special election, to be held at the same time as the gubernatorial primary elections to be held in 1979, to submit to a vote of the voters of the existing Tenth Judicial District, being the parishes of Natchitoches and Red River, for their approval or disapproval as provided in Section 15 of Article V of the Louisiana Constitution of 1974, the following proposition in substantially the following form:

> FOR the proposition that the Tenth Judicial District be divided, effective March 1, 1980, by the establishment of the Thirty-Ninth Judicial District composed of Red River Parish, and continuing the Tenth Ju-

dicial District composed of Natchitoches Parish as provided by Act No. 635 of the 1979 Regular Session of the Louisiana Legislature.

and also:

AGAINST the proposition that the Tenth Judicial District be divided, effective March 1, 1980, by the establishment of the Thirty-Ninth Judicial District composed of Natchitoches Parish as provided by Act No. 635 of the 1979 Regular Session of the Louisiana Legislature.

The secretary of state shall fill in the number of this Act in the propositions.

The special election provided for in this Section shall be conducted in accordance with law.

Section 9. If the proposition submitted to the electors as provided for in Section 8 of this Act is approved by the electors then:

(1) on and after March 1, 1980, the Tenth and Thirty-Ninth Judicial Districts shall be composed as is provided in Section 1 of this Act;

(2) the governor, within fifteen days after the date the results of the referendum provided for in Section 8 of this Act become official as provided in Section 575 of the Louisiana Code, shall call a special election for the purpose of electing a judge and a district attorney for the Thirty-Ninth Judicial District. The primary election shall be held on the first Saturday in January, 1980, and the general election shall be held on the sixth Saturday after the first Saturday in January, 1980. The elections herein provided for shall be conducted in accordance with law;

(3) the judge and district attorney elected at the special election herein provided for shall take office on March 1, 1980, and shall serve for terms which shall expire at the same time as the terms provided by law for judges of

district courts and for district attorneys throughout the state;

(4) the successors to the judge and district attorney elected at the special election provided for herein shall be elected at the same time and in the same manner as is provided by law for the election of district attorneys and judges of district courts throughout the state; and

(5) the judges and district attorney of the Tenth Judicial District who hold those offices on the effective date of this Act, shall continue to serve as judges and district attorney for that district until March 1, 1980. On and after March 1, 1980, the judges and district attorney of the Tenth Judicial District shall serve as judges and as district attorney for the Tenth Judicial District composed as is provided in Section 1 of this Act, until their terms expire and thereafter the judges and district attorney for the Tenth District shall be elected at the same time and in the same manner as is provided by law for the election of judges and district attorneys of district courts throughout the state.

Section 10. In the event more than one judicial district is established by authority of legislation passed at the 1979 Regular Session of the Louisiana Legislature, and two or more of such newly established districts are designated by the same number, the secretary of state is hereby authorized and directed to assign consecutive numbers to the newly established judicial districts, commencing with the Thirty-Eighth Judicial District, and to properly designate on the ballot provided for in Section 7 of this Act the number of the new districts created under the provisions of this Act.

* * * *

Section 12. The provisions of Sections 7, 8, 9, 10, 11, 12, 13, and 14 of this Act shall become effective upon signature by the governor or, if not signed or vetoed by the governor, upon expiration of the time for bills to be-

come law without signature by the governor, as provided by Article III, Section 18 of the Constitution. The provisions of Section 6 of this Act shall become effective on September 1, 1979, and the provisions of Sections 1, 2, 3, 4, and 5 of this Act shall become effective on March 1, 1980, if the proposition submitted to the electors as provided in Section 8 of this Act is approved by the electors. If the proposition is disapproved, the provisions of this Act shall expire and be null, void, and of no effect.

Section 13. For the purpose of transmission of this Act to the United States Department of Justice, as required by federal law, this Act shall become effective upon signature by the governor, or if not signed or vetoed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided by Article III, Section 18 of the Constitution.

Section 14. All laws or parts of laws in conflict herewith are hereby repealed, and R.S. 16:245 and R.S. 16:246 are hereby repealed in their entirety.

Section 15. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable.

Approved by the Governor: July 18, 1979.

Published in the Official Journal of the State: August 13, 1979.

A true copy:

PAUL J. HARDY
Secretary of State.

[From Louisiana Session Laws, Special Session of 1981]

ACT No. 34

Senate Bill No. 22. By: Mr. Jumonville.

AN ACT

To amend and reenact Section 621.20 of the Louisiana Revised Statutes of 1950, relative to the number of judges for the Twentieth Judicial District; to provide for one additional judge; to provide for the qualifications, election, term, and compensation of the additional judge; and otherwise to provide with respect thereto.

Be it enacted by the Legislature of Louisiana:

Section 1. Section 621.20 of Title 13 of the Louisiana Revised Statutes of 1950 is hereby amended and reenacted to read as follows:

§ 621.20. Twentieth Judicial District

The Twentieth Judicial District shall have two judges.

Section 2. A. There is hereby created an additional office of district judge for the Twentieth Judicial District Court for the parishes of East Feliciana and West Feliciana.

B. For purposes of nomination and election only there are hereby created in the Twentieth Judicial District two administrative divisions, to be designated as Division A and Division B. The judge serving in the existing judgeship on the effective date of this Act and his successors in office shall preside over Division A. The first person to serve as judge of the newly created judgeship provided for in Subsection A of this Section and his successors in office shall preside over Division B.

C. The additional judge herein provided for shall be elected at large from the Twentieth Judicial District and shall have jurisdiction throughout the district and shall be elected by the qualified voters of the district.

D. The additional judge shall have the same qualifications and shall receive the same emoluments of office,

compensation and expense allowances, payable from the same sources and in the same manner, as are now or may hereafter be provided for the other judge of the district court.

E. The first judge to be elected to the additional judgeship shall be elected as provided by Article V, Section 22 of the Constitution. He shall take office on June 1, 1982 and shall serve for a term that shall expire at the same time as is provided by law for the other judge of the court. Thereafter, the successors to the additional judgeship provided for by this Act shall be elected at the same time and in the same manner and shall serve the same term as is now or may be hereinafter provided for other judges of the district.

Section 3. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid provision, item, or application, and to this end the provisions of this Act are hereby declared severable.

Section 4. All laws or parts of laws in conflict herewith are hereby repealed.

Section 5. This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided in Article III, Section 18 of the Constitution of Louisiana.

Approved by the Governor: November 19, 1981.

Published in the Official Journal of the State: December 15, 1981.

A true copy:

JAMES H. "Jim" BROWN
Secretary of State.